

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 * * *

4 WENDY DAYLEY, an individual,

5 Plaintiff,

6 v.

7 LVGV, LLC, a Nevada Limited Liability
8 Company d/b/a M Resort Spa and Casino,
9 Does 1-20, inclusive; and Roe Business
Entities 1-10, inclusive,

10 Defendants.

Case No. 2:23-cv-00456-CDS-EJY

11 **ORDER**

12 Pending before the Court is Defendant LVGV, LLC's ("Defendant") Motion for Rule 35
13 Examination. ECF No. 35. The Court has considered the Motion, Defendant's Response (ECF No.
14 38), and Defendant's Reply (ECF No. 39).

15 **I. Background**

16 On November 7, 2023, the parties filed a Stipulation to Extend Discovery indicating
17 Defendant requested Plaintiff participate in a Federal Rule of Civil Procedure (sometimes "FRCP")
18 35 examination by a neuropsychologist who would assess Plaintiff's claimed traumatic brain injury.
19 ECF No. 33 at 2. The same day the Court granted the Stipulation advising the parties that FRCP 35
20 examinations are "governed by federal, not state law." ECF No. 34 at 2 *citing Freteluco v. Smith's*
Food and Drug Centers, Inc., 336 F.R.D. 198 (D. Nev. 2020).

21 In the instant Motion, Defendant submits FRCP 35 governs the neuropsychologists'
22 examination of Plaintiff arguing Nevada Assembly Bill ("A.B.") 244 is procedural law inapplicable
23 in federal court.¹ ECF No. 35 at 5-8. In response, Plaintiff contends applying FRCP 35 would
24 impermissibly abridge the rights afforded in A.B. 244 because this new state law creates substantive
25 rights together with a private right of action to enforce those rights. ECF No. 38 at 5-13. In reply,
26 Defendant explains that A.B. 244 is procedural because it attempts to regulate the process connected
27 to examinations conducted during the course of litigation and does not address substantive rights at

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¹ A.B. 244, 82nd Gen. Assemb., Reg. Sess. (Nev. 2023).

1 issue, which are tort-based causes of action under state law. ECF No. 39 at 3. Defendant further
 2 argues the Court recently considered the argument presented by Plaintiff and concluded Rule 35
 3 governs in federal court. *Id.* at 4.

4 **II. Discussion**

5 **A. Federal Law Applies to Rule 35 Examinations in Federal Court.**

6 The Motion before the Court presents the issue of whether federal or state law governs
 7 Plaintiff's pending neuropsychological examination. Under FRCP 35, “[t]he court where the action
 8 is pending may order a party whose mental or physical condition—including blood group—is in
 9 controversy to submit to a physical or mental examination by a suitably licensed or certified
 10 examiner. ... The order ... must specify the time, place, manner, conditions, and scope of the
 11 examination, as well as the person or persons who will perform it.” Fed. R. Civ. P. 35. When
 12 considering arguments similar to those presented by the parties here, the Court endorsed “the
 13 majority rule adopted by federal courts that exclude third parties from observing medical and
 14 psychiatric examinations,” which falls within the Court’s wide discretion authorized in FRCP 35.
 15 *Freteluco*, 336 F.R.D. at 203.

16 In contrast, Nevada Assembly Bill (“A.B.”) 244, enacted in 2023, provides the following
 17 rights and remedies:

18 Notwithstanding any other provision of law and except as otherwise provided in
 19 this section, a person compelled to submit to a mental or physical examination
 20 pursuant to a court order, a contractual obligation or any other type of obligation
 21 retains the right to ... [h]ave any observer of choice present throughout the
 22 examination, including, without limitation, the person's attorney, provider of health
 23 care or any other person hired by or on behalf of the person; [and] [a]fter providing
 24 notice to the examiner, make an audio, stenographic or video recording of the
 25 examination or appoint an observer to make such a recording. ...[A] person
 26 compelled to submit to a mental or physical examination may bring an action in a
 27 court of competent jurisdiction for a violation of this section to seek any or all of
 28 the following relief, if notice of the alleged violation is provided to the person who
 allegedly violated this section not later than 7 days before the action is commenced:
 (a) Attorney's fees; (b) Actual damages or a fine of \$1,500, whichever is greater;
 (c) Injunctive relief; (d) Protective relief; or (e) An order prohibiting the use of any
 information gathered at the examination in any judicial or administrative
 proceeding.

29 A.B. 244 §1(b), (e), §4.

1 The Court’s holding in *Freteluco* explains that “[u]nder the *Erie* Doctrine, a federal court
 2 sitting in diversity must apply the substantive law of the forum state and federal procedural law.”
 3 336 F.R.D. at 202 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). When determining if
 4 a law is substantive or procedural, the Court should consider whether “it significantly affect[s] the
 5 result of a litigation for a federal court to disregard a law of a State that would be controlling in an
 6 action upon the same claim by the same parties in a State court.” *Id.* at 203 (citing *Gasperini v.*
 7 *Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996)). The Court also considers the twin aims of
 8 “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”
 9 *Gasperini*, 518 U.S. at 428 (internal quotations omitted). Applying the above principles, the Court
 10 in *Freteluco* found that “whether an observer is present in [a] neuropsychological examination … is
 11 not substantive, but procedural.” *Id.*

12 Under A.B. 244, a person compelled by court order to attend a mental or physical
 13 examination has the right to have an observer present during the examination and make a recording
 14 of the examination. A.B. 244 §1(b). Clearly, A.B. 244 addresses “whether an observer is present in
 15 [a] neuropsychological examination” and, according to *Freteluco*, is a procedural rule, not
 16 substantive. *Freteluco*, 336 F.R.D. at 203. Substitution of state procedural rules, such as A.B. 244,
 17 for federal ones is impermissible. *Erie*, 304 U.S. at 78. This holding is confirmed in *Finley et al v.*
 18 *Bulman et al*, Case No. 2:23-cv-00930-RFB-DJA (ECF No. 32 Dec. 8, 2023 Transcript of
 19 proceedings on Nov. 14, 2023). In that decision, the District of Nevada considered whether A.B.
 20 244 controlled when Rule 35 examinations are sought during the course of litigation before the
 21 federal court. Applying *Freteluco*, the *Finley* Court held that because A.B. 244 regulated whether
 22 an observer is present for a Rule 35 examination, and “[w]hether an observer is present for a Rule
 23 35 examination is not substantive, but is procedural,” A.B. 244 was not applicable in federal court.
 24 *Id.* at 7:1-5. Finally, as stated in *Freteluco*, “presumptively applying Fed. R. Civ. P. 35 to all
 25 litigation in federal court will undoubtedly promote equitable administration of law while
 26 discouraging forum shopping.” 336 F.R.D. at 203.

27 Based on the foregoing, the Court finds that FRCP 35 is applicable to Plaintiff’s examination,
 28 not A.B. 244.

B. The Majority Federal Rule Excludes Third Parties from FRCP 35 Examinations.

2 The Court continues to “agree with the majority rule adopted by federal courts that exclude
3 third parties from observing medical and psychiatric examinations.” *Freteluco*, 336 F.R.D. at 203.
4 As explained “[t]he introduction of a third party changes the nature of the proceeding, much in the
5 way that television coverage of events qualitatively changes what occurs in front of the camera.” *Id.*
6 (citation omitted). Indeed, “[t]he introduction of a third party is necessarily distracting to the
7 examiner and the examinee, and clearly heightens an already adversarial process into one that is
8 simply more so.” *Id.* at 204 (citing *Smolko v. Unimark Lowboy Trans.*, 327 F.R.D. 59, 61-62 (M.D.
9 Penn. 2018)). This reluctance extends to the presence of recording devices during examinations as
10 well. *Freteluco*, 336 F.R.D. at 203 (citing *Flack v. Nutribullet, LLC*, 333 F.R.D. 508, 517-18 (C.D.
11 Cal. 2019)). Consistent with the Court’s adoption of the majority rule excluding third parties from
12 observing medical and psychiatric examinations, the Court finds that a third party observer and/or a
13 recording device should not be present during Plaintiff’s FRCP 35 neuropsychological examination.²

14 || III. Order

15 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Rule 35 Examination
16 (ECF No. 35) is GRANTED.

17 Dated this 27th day of February, 2024.

Elayna J. Youchah
ELAYNA J. YOUCRAH
UNITED STATES MAGISTRATE JUDGE

23 ² Defendant argues because FRCP 35 applies, Plaintiff must demonstrate “good cause” to have an observer
24 present during her neuropsychological examination. ECF No. 39 at 9. Defendant further contends there is no “good
25 cause” here because Plaintiff fails to demonstrate any extraordinary or out of the ordinary circumstances warranting
26 observation. *Id.* Defendant concludes having an observer present would invalidate the tests administered during the
27 examination, which outweighs any good cause Plaintiff could possibly present. *Id.* at 9-13. Plaintiff argues if FRCP 35
28 governs there is “good cause” for an observer during the examination as observation will decrease the likelihood of
mistakes by the examining doctor and prevent misreports “with no corrective mechanism available.” ECF No. 38 at 13-
17. Although *Freteluco* discussed the “middle road approach taken by some federal courts,” which requires a showing
of “good cause,” the Court finds nothing about the current circumstances meets that standard. In fact, if all that was
required to demonstrate the need for a third party observer was the allegation of the potential for error—with no
evidentiary support—the exception would swallow the majority rule. Plaintiff’s argument regarding good cause is
rejected.